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JUN 4 1964
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No. 930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH L. SANAPAW,
WILLIAM J. GRIGNON,
FRANCIS BASINA,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES

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WILSON - EPES PRINTING CO. - RE 7-600: - WASHINGTON 1, D. C.

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We will have to discuss the merits in order to respond to the Solicitor General's memorandum. At this stage our point will be not to convince the Court that we are right so much as it will be to show that the case is far from the simple one the Solicitor General sees. In fact, the case involves a fundamental, complex and unsettled question of the nature of Indian hunting rights, and after that, the effect of Congressional silence upon such rights in this case. These questions, particularly the former, are well deserving of being settled by this Court.

The Solicitor General takes the simple position that the 1854 treaty did not purport to confer hunting rights greater than those possessed by the ordinary landowner, hence after termination the Indians became subject to

state regulation the same as the ordinary landowner. Under his theory, the question of Congressional intent poses no problem: he concludes that since Congress intended for the state to assume police power over ordinary Menominee activities (which is clear and which we concede), hunting too became subject to state regulation. He concedes that he might see the case differently if the 1854 treaty had purported to confer hunting rights of greater dignity than those incidental to the ownership of property —rights amounting to a permanent immunity from State regulation."

This position no doubt is appealing, partly because it is simple, and partly because the Solicitor General himself has endorsed it. However, it was not the position of either of the courts below, and seems to have been reached without any consideration, much less understanding, of the special status of Indian hunting and fishing rights, as reflected by the cases and other sources.

Throughout our history there has been an awareness of the special rights of Indians to hunt for subsistence without regard to conservation restrictions. For example, the Migratory Bird Treaty between the United States and Great Britain makes certain exceptions for Indians hunting for their own use. So do the Fur Seal Agreement between the United States and Canada, and other international treaties and conventions. So have various acts of Congress.

[illegible]

This is only a reflection of the needs and traditions of Indians—members of a hunting and gathering culture. If, indeed, their treaties are to be understood as that unlettered people understood them, then, to hold lands "as Indian Lands are held" if it means anything means the Indians can gain their subsistence from them as free of restrictions as before the treaty.

In Minnesota, due to special circumstances (a hiatus in Indian title), state game regulations have applied to the White Earth Chippewa Reservation since 1858. Of course the state had no jurisdiction over the persons of restricted Indians on the reservation, but if game illegally caught by such Indians left the reservation, it could be confiscated. But even though state game laws applied on that reservation, *there was an implied exception for Indians' hunting for food.* These cases clearly recognized that Indian hunting rights, even implied ones, were more than mere landowners' rights.

Even off-reservation rights, which are clearly subject to state regulations, have certain implied advantages. For example, the Indians do not need to buy a license, and they have an *implied* exemption from state game laws un-

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ing and fishing rights. And when the Dalles Dam cut off Indian fishing rights in the Columbia River, Congress paid $27,000,000 in compensation therefor. *See Whitefoot v. United States*, ——— Ct.Cl. ———, 293 F.2d 658, 672 (1961), cert. den. 369 U.S. 818.

United States v. Winans, 198 U.S. 371, 380 (1905).

Selkirk v. Stivers, 72 Minn. 335, 75 N.W. 386 (1898). If on the other hand the state's game laws had not applied on the reservation, the game could not be confiscated when it left the reservation. *Cobb v. Gould*, 177 Minn. 398, 225 N.W. 435 (1929); *Tacoma Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930).

State v. Cooney, 77 Minn. 388, 80 N.W. 696 (1899); *State v. Jackson*, 218 Minn. 220, 16 N.W.2d 752 (1944).

Tulee v. Washington, 315 U.S. 681 (1942); *State v. McConville*, 65 Idaho 46, 139 P.2d 485 (1943).

less the state can prove that their hunting or fishing will deplete the game or fish."

Implied Indian hunting and fishing rights are nothing new, and in fact inside the reservation they usually *are* implied, since few treaties expressly guaranteed such rights inside the reservation.[9] Other courts, in addition to the courts below, have had no difficulty finding *implied* exclusive hunting or fishing rights on a reservation, and such rights must have been more than those of a mere landowner or else there would have been no occasion for controversy.[10]

This Court has held that where Congress set aside certain islands for the Metlakatla Indians, there was an *implied* provision for exclusive fishing rights in the sur-

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Makah Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951); *Maison v. Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829). Indeed, *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den. 347 U.S. 937, held that off-reservation treaty hunting rights were not subject to state regulation at all. This holding narrowly missed being adopted by Washington: *State v. Satiacum*, 50 Wash.2d 513, 314 P.2d 400 (1957) (decided 4-4—half the court endorsed the *Schoettler* rule; the other half would have gone much further and adopted the *Arthur* rule).

[9] The only treaty guaranteeing on-reservation hunting or fishing rights of which we are aware is the Yakima Treaty, 12 Stat. 951 (1855). Almost invariably, express hunting or fishing guarantees apply only to off-reservation locations. See the many treaties cited in Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo.Wash.L.Rev. 504 nn. 37-41 (1964). This article, incidentally, was written by one of the undersigned attorneys in March, 1963, prior to the appellate decision below, and before his firm had any idea it would be retained in this case. This article was later edited to bring it up to date, and published in April, 1964.

[10] *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (1933); *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (N.D. Ind. 1940); *United States v. Sturgeon*, 27 Fed. Cas. 1357 (No. 16413) (D.Nev. 1879); Dept.Int., *Federal Indian Law* 497-8 (1958); and the two Klamath cases referred to at p. 11 of our Petition. Compare *Winters v. United States*, 207 U.S. 564 (1908), where the Indians were held to have *impliedly* reserved water rights.

rounding waters.[11] Other courts have extended reservation boundaries *by implication*, contrary to common law, because of Indian fishing activities.[12]

Within the reservation, the Indian hunting and fishing rights have been held exempt even from federal regulation, even where the rights were implied and not express. The Shoshone Treaty did not expressly guarantee hunting rights on the reservation,[13] but nevertheless a Shoshone Indian may hunt on his reservation without regard to the Migratory Bird Treaty.[14] The Quinault Treaty likewise did not guarantee exclusive rights within the reservation, yet fishing regulations promulgated by the Secretary of Interior were held void.[15] The Court said:

> "But the fish and the waters in this stream [within the reservation] do not belong to the state, nor to the

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[11] *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). This is an example of the special status of Indian hunting and fishing rights: a non-Indian cannot have exclusive fishing rights in navigable waters. See cases cited at note 27 of Hobbs, note 9 above.

[12] *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), cert. den. 330 U.S. 827; *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936); *United States v. Slotts*, 39 F.2d 619 (W.D.Wash. 1930). And see *Skokomish Tribe v. Evans*, 320 F.2d 205 (9th Cir. 1963), cert. den. 376 U.S. 943, which recognized the rule but found that the facts did not call for its application.

[13] The treaty did guarantee hunting rights on "unoccupied lands of the United States so long as game may be found thereon," but this is obviously an off-reservation guarantee. 15 Stat. 673.

[14] *United States v. Cutler*, 37 F.Supp. 724 (D.Ida. 1941). While the Migratory Bird Treaty contains certain express exemptions for Indians, see note 1 above, these did not apply in this case.

[15] *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925). This is not to say that Congress lacks *power* to regulate Indian hunting and fishing, because of course it has such power. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But if it confiscated such rights by exercise of such power, just compensation would be. See *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937).

United States; but to the Indians of this Reservation."

In light of this background, it cannot seriously be contended that the Menominees had no more hunting rights than any landowner. The lack of an express treaty guarantee is not controlling; there is no need for such a guarantee within a reservation, and this is all the more true in our case, where the background shows that the very reason the Indians were induced to agree to this particular reservation was because it afforded good hunting. The Menominees were hunters, and their economy —food, shelter, bartering medium—was based on hunting. One can imagine how the Indians would have reacted to the suggestion that they would be subject to restrictions as to seasons, bag limits, species, sex, and hunting methods not in accordance with the nimrod's genteel customs. If Indian treaties are to be construed as the Indians understood them,[9] it must be concluded that "to be held as Indian Lands are held" guaranteed the right of the Menominees to hunt within their reservation as before, and with immunity from outside restrictions, or at least from such restrictions as are designed merely to conserve game for the benefit of sportsmen.[10]

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[9] For similar language, *see Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557 (1930).

[10] *See Menominee Tribe* v. *United States*, 95 Ct.Cl. 232 (1941), quoted in our Petition at p. 5.

[11] *United States* v. *Winans*, 198 U.S. 371, 380 (1905).

[12] We would even concede, arguendo, that the Menominees would have no right to totally deplete a game resource in a zone which included a substantial area outside the reservation. Cf. the *Schoettler* and *Matsch* cases, note 8 above. We note there is little likelihood that continued unrestricted Menominee hunting would have any serious impact on the area's game resources. Furthermore, the leaders of the Tribe have no intention of permitting unrestricted hunting.

The four courts which have considered the very question involved here, including the one with whose conclusion the Solicitor General agrees, were aware that considerably more was involved here than mere landowner's rights.

In the *Klamath* case, the Klamath Treaty expressly guaranteed *fishing* rights, but did not mention hunting rights. Nevertheless the courts held that termination did not deprive the Klamaths of their immunity from state hunting regulations. The courts did not follow the Solicitor General's theory that the only reason the rights were immune before termination was because the state lacked general jurisdiction over the reservation.

Neither did either of the courts below, even though they eventually reached opposite conclusions.[2] The Solicitor General's theory is so obvious and attractively simple that if it were tenable, one would suppose that at least the appellate court below would have relied on it, rather than taking the much more complex approach which the facts and the law demand. The appellate court concluded that the treaty language "to be held as Indian Lands are held" created implied hunting rights, which the court characterized as "*special* hunting and fishing rights."[3] A mere landowner's hunting rights, of course, are not special. Finally, it concluded that Congress "abrogated" the immunity from regulation when it enacted the Term-

[2] The two courts below and the two Klamath cases cited at p. 11 of our Petition.

[3] The Solicitor General realized this, he stated, note 2, "To the extent that the court below may have adopted a contrary interpretation of the Treaty of 1854, we do not subscribe to its views."

The court dwelt briefly, R. 153-4, on whether the "Menominee reservation" was entirely within their aboriginal territory. This would be wholly irrelevant if the only reason the state could not regulate prior to termination was because of its general lack of jurisdiction over the reservation. The court also dealt extensively with the intent of Congress, which would have required no analysis at all if the Solicitor General's theory were correct.

[4] R. 155, emphasis added.

ination Act.[1] "Abrogation" is not a term one would use to describe the mere transference of federal police power to the state.

In summary, our theory is that, in accordance with the sense of *Winans*,[2] the treaty language "to be held as Indian Lands are held" necessarily guaranteed the right of the Menominees to hunt free of outside restriction, state or federal (subject always to Congressional *power* to impose restrictions on payment of just compensation). This freedom from regulation was the only significant incident of the right, since the Menominee Indians separately possess all other incidents by virtue of the fact that they own the land. To cancel this immunity from regulation would be tantamount to a total abrogation of the hunting right. Congress was silent on whether this right was to be thus abrogated, and under well settled principles of Indian law, mere silence would not work an abrogation. This presumption is strengthened by the fact that Congress did not see fit to add express language of abrogation after being advised by officials of the Interior Department that the Termination Act would not affect any treaty rights. The most that can fairly be said of Congress's silence is that it intended to let the courts work out the extent of the hunting right. And that is all we are asking here.

Respectfully submitted,

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[1] R. 159.

[2] *United States v. Winans*, 198 U.S. 371, 380-381 (1905).